



For a thriving New England

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September 24, 2014

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VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

RE: Notice of Violations and Intent to File Suit under the Clean Water Act

To Whom It May Concern:

The Conservation Law Foundation (“CLF”)¹ hereby gives notice to the addressed persons of its intent to file suit pursuant to Section 505 of the Federal Water Pollution Control Act (“Clean Water Act,” “CWA” or “Act”), 33 U.S.C. § 1365(a), for violations of the Act specified below. This letter constitutes notice pursuant to 40 C.F.R., part 135 (the “Notice”) to the addressed persons of CLF’s intention to file suit in United States District Court of the District of New Hampshire seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this Notice letter.

The subject of this action is two-fold. First, Hampton River Marina, LLC (“Hampton River Marina”), is discharging stormwater directly associated with the water transportation (SIC 4493) and boat and ship building and repair (SIC 3732) facility located at 55 Harbor Road, Hampton NH 03842 (the “Facility”), to the waters of the United States without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B). Second, Hampton River Marina has failed to obtain

¹ CLF is a not-for-profit 501(c)(3) organization dedicated to the conservation and protection of New England’s environment.

coverage under any Clean Water Act permit including the Multi-Sector General Permit² (“MSGP”) adopted by EPA for industrial sources of polluted stormwater runoff, and failed to comply with the specific requirements of any such permit, in violation of 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1). In addition, Hampton River Marina has failed to obtain individual NPDES permit coverage for the process water discharges associated with its pressure washing activities.

BACKGROUND

The Hampton/Seabrook Harbor (Waterbody ID NHEST600031004-09-06, hereinafter the “Hampton Harbor”) is within the Hampton River Watershed. The Environmental Protection Agency has designated Hampton Harbor as a habitat for “fish, shellfish, wildlife protection and propagation, public water supply, aquatic life harvesting and for primary and secondary contact recreation.” Hampton Harbor does not meet these standards and the Environmental Protection Agency (“EPA”) has designated Hampton Harbor as impaired pursuant to Section 303(d) of the Act for failure to meet minimum water quality standards for pollutants.³ Hampton Harbor is impaired due to pathogens, dioxins, mercury and polychlorinated biphenyls.⁴

Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt.⁵ Industrial activities, such as material handling and storage, equipment maintenance and cleaning, industrial processing, vessel and equipment fluid changes, mechanical repairs, parts cleaning, sanding, blasting, welding, refinishing, painting, fueling, vessel and vehicle exterior washdown, or other operations that occur at industrial facilities, may be exposed to stormwater.⁶ Stormwater from industrial facilities, contaminated with pollutants, is then conveyed into nearby waterbodies.⁷

Hampton River Marina is required to apply for coverage under a Clean Water Act discharge permit such as the MSGP in order to discharge lawfully. Since at least 2007, Hampton River Marina has been specifically required to apply for coverage under the MSGP by filing a Notice of Intent (“NOI”) within 90 days after the initial issuance of the MSGP.⁸ On September 29,

² ENVIRONMENTAL PROTECTION AGENCY, MULTI-SECTOR GENERAL PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITY (MSGP) (hereinafter MSGP), *available at* http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf (last visited February 27, 2013).

³ See 33 U.S.C. § 1313(d).

⁴ http://ofmpub.epa.gov/tmdl_waters10/attains_waterbody.control?p_list_id=NHEST600031004-09-06&p_cycle=2010&p_state=NH&p_report_type=

⁵ See 40 C.F.R. § 122.26(b)(13).

⁶ See 40 C.F.R. § 122.26(b)(14).

⁷ See 58 Fed. Reg. 61,146, 61,154 (November 19, 1993).

⁸ EPA’s Final National Pollutant Discharge Elimination System Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP) was first issued in 1995, reissued in

2008, after expiration of the prior permit, the EPA issued a new MSGP requiring all covered facilities to file an NOI for coverage under the 2008 permit by January 5, 2009.⁹

Hampton River Marina has failed to obtain coverage under the MSGP or any other valid authorization, including individual NPDES permit coverage for process water discharges, at any time. Therefore, Hampton River Marina is operating in violation of the Clean Water Act.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

Hampton River Marina is the person, as defined by 33 U.S.C. § 1362(5), responsible for the violations alleged in this Notice. Hampton River Marina has operated the Facility since at least 2007, currently advertises as the operator of the Facility, and is registered with the New Hampshire Secretary of the State Corporation Division as the operator of the Facility.¹⁰ Hampton River Marina and its agents and directors, including but not limited to Emile R. Bussiere Jr. and Allan Abruzzio have operational control over the day-to-day industrial activities at this Facility. Therefore, they are responsible for managing stormwater at the Facility in compliance with the Clean Water Act.

LOCATION OF THE ALLEGED VIOLATION

The violations alleged in this Notice have occurred and continue to occur at the water transportation (SIC 4493) and boat and ship building and repair (SIC 3732) Facility located at 55 Harbor Street, Hampton NH 03842.

ACTIVITIES ALLEGED TO BE VIOLATIONS

Hampton River Marina has, and continues to, engage in “industrial activities,” and its operations fall under SIC Codes 4493 and 3732, within the meaning of 40 C.F.R. §§ 122.26(b)(14)(ii) & (viii).¹¹ Because the Facility has primary SIC Codes 4493 and 3732 and stormwater discharges associated with industrial activity, Hampton River Marina is required to apply for, obtain coverage, and comply with the requirements of a National Pollutant Discharge Elimination System (“NPDES”) permit such as the MSGP. In addition, Hampton River Marina is required to

2000, and again in 2008. *See* 60 Fed. Reg. 50,804 (Sept. 29, 1995); 65 Fed. Reg. 64,746 (Oct. 30, 2000); and 73 Fed. Reg. 56,572 (Sept. 29, 2008). *See* MSGP part 1.1 and 1.3.1.

⁹ *See* MSGP Table 1-2.

¹⁰ <https://www.sos.nh.gov/corporate/soskb/Corp.asp?365622>.

¹¹ *See* MSGP, Appendix D: Activities Covered. Water transportation (SIC 4493) and boat and ship building and repair (SIC 3732) facilities are subject to the requirements of the MSGP for stormwater discharges.

obtain individual NPDES permit coverage for its process water discharges. Hampton River Marina has failed to take any of these required steps.

Hampton River Marina's industrial activities at the Facility include, but are not limited to: pressure washing; surface preparation; paint removal; sanding; painting; dry dock operation and maintenance; engine maintenance and repairs; fueling; material handling, transfer, storage and disposal; and shipboard processes improperly discharged to storm sewer or into receiving water. Vehicles drive on and off the Facility. The Facility's parking and material handling areas are stained and covered with polluted sediment.

Industrial activities and materials at the Facility are exposed to precipitation and snowmelt. Precipitation falls on and flows over the Facility, picking up paint solids, metals including heavy metals, suspended solids, debris, spent abrasives, solvents, spent solvents, dust, low density waste (floatables), oil, ethylene glycol, acid/alkaline wastes, detergents, rags, fuel, trash, and other pollutants associated with the Facility's operations. The polluted runoff is then conveyed off-site via man-made collection systems and conveyances and the operation of gravity into waters of the United States.¹²

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED

The Clean Water Act prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid NPDES permit.¹³ Hampton River Marina discharges stormwater associated with its industrial activity, as defined by 40 C.F.R. § 122.26(b)(14), and process water from its Facility to waters of the United States. Because Hampton River Marina has not obtained coverage for these stormwater discharges under the MSGP or an individual NPDES permit, it is illegally discharging stormwater and process water without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).¹⁴ By failing to apply for and comply with the specific requirements of the MSGP and individual NPDES permit program, Hampton River Marina is in violation of 33 U.S.C. 1311(a) and 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

a. Hampton River Marina is discharging stormwater to waters of the United States without a permit.

¹² See 40 C.F.R. § 122.26(c)(i)(E)(6). EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity.

¹³ 33 U.S.C. § 1311(a).

¹⁴ See 33 U.S.C. § 1362(12); 40 C.F.R. § 122.2; MSGP, Appendix A: Definitions, Abbreviations, and Acronyms (defining the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source").

Hampton River Marina is an industrial discharger with primary SIC Codes 4493 and 3732, which means that pursuant to Section 402(p) of the Act, Hampton River Marina is obligated to apply for coverage under the MSGP or obtain other legal authorization. Because Hampton River Marina has operated and continues to operate without a permit under Section 402(p), Hampton River Marina is in violation of Section 301(a) of the Act.

In addition, during storm events, Hampton River Marina's industrial activities at its Facility have resulted in a "discharge of pollutants" within the meaning of 33 U.S.C. § 1362(12) and "stormwater discharge associated with industrial activity" within the meaning of 40 C.F.R. § 122.26(b)(14), from its Facility on each and every day that there has been a measurable precipitation event of above 0.1 inches. There have been many such storm events since 2007. The Facility is generating and conveying pollutants from at least the following "point sources:" ramps, outfalls, catch basins, drains, equipment left outdoors, site grading, the vehicles driving on and off the Facility, shallow subsurface hydrological connections and other conveyances to waters of the United States.¹⁵ The Hampton Harbor is a "water of the United States," as defined in 40 C.F.R. § 122.2, and therefore, a "navigable water," as defined in 33 U.S.C. § 1362(7). The Facility is discharging this industrial stormwater without the permits required under Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311, 1342.

b. Hampton River Marina is discharging process water to waters of the United States without a permit.

Boat washwater is classified as an industrial waste under state regulations and as process wastewater under the federal Clean Water Act. Pressure washwater can contain a variety of pollutants including detergents, oil, and grease, as well as dissolved metals from antifouling paints. Ablative bottom paints, which are designed to slowly slough away from the hull, are particularly prone to contaminating washwater with toxic metals such as zinc, copper, and occasionally, lead. In addition, solids suspended in the washwater, such as paint chips and organic materials, can pollute ground and surface water and must be handled properly.

Discharging boat washwater without a permit is illegal and can have severe and long-term impacts on the aquatic environment. Solids and dissolved metals contained in the pressure washwater can be toxic to marine life. In addition, improperly managed pressure washing operations can result in unsightly plumes that discolor natural waterways and stain natural features with bottom paint.

¹⁵ These discharges constitute "point sources" as defined by 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2. Under 40 C.F.R. § 122.2, "discharge of a pollutant" includes "surface runoff which is collected or channelled by man."

Boat washwater, including pressure washing water, is not covered by the NPDES Multi-Sector General Permit for stormwater management. Instead, discharges of washwater must be covered by an individual NPDES permit. Hampton River Marina does not have an individual NPDES permit authorizing the discharge of pressure washwater to waters of the United States.

c. Hampton River Marina is violating the Clean Water Act by failing to obtain coverage and failing to comply with the requirements of the MSGP.

Hampton River Marina is violating 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1), by failing to apply for, obtain coverage, and comply with the requirements of the MSGP.¹⁶ The Facility has primary SIC Codes of 4493 and 3732 and must obtain coverage under the MSGP for its stormwater discharges and for stormwater discharges from any co-located industrial activities.¹⁷ Hampton River Marina's failure to obtain coverage and comply with the permit conditions is in violation of the MSGP and 33 U.S.C. § 1342(p) of the Clean Water Act.¹⁸

1) Hampton River Marina Must Develop and Implement a Stormwater Pollution Prevention Plan (SWPPP).

As a prerequisite to obtaining coverage under the MSGP, Hampton River Marina must prepare a Stormwater Pollution Prevention Plan ("SWPPP").¹⁹ The SWPPP must include, but is not limited to, the following: information related to a company stormwater pollution prevention team, a site description, a summary of pollutant sources, a description of control measures, and schedules and procedures pertaining to control measures and monitoring.²⁰ Hampton River Marina has failed to develop a SWPPP in accordance with the MSGP requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

2) Hampton River Marina Must Submit to EPA a Complete Notice of Intent to be Covered under the MSGP.

To be eligible to discharge under the MSGP, Hampton River Marina must submit a complete Notice of Intent ("NOI") to the EPA.²¹ To complete the NOI, Hampton River Marina is required

¹⁶ MSGP part 1.1 and 1.2.

¹⁷ See MSGP part 1.1; MSGP parts 8.Q and 8.R.

¹⁸ A thorough search of EPA's Electronic Stormwater Notice of Intent database reveals that Hampton River Marina has not filed an NOI for the Facility. EPA's Electronic Stormwater Notice of Intent database, <http://cfpub.epa.gov/npdes/stormwater/noi/noisearch.cfm> (last visited September 22, 2014).

¹⁹ See MSGP part 5.

²⁰ See MSGP part 5.1.

²¹ See MSGP part 1.3.1.

to determine whether the body of water the stormwater is discharged to is an “impaired” water body, and whether the Facility discharges any specific pollutants listed on the NOI to that water body.²² Hampton Harbor is classified as an “impaired” water.²³ Because Hampton River Marina is a “New Discharger” under the MSGP,²⁴ it must also provide data and other technical information to EPA to discharge to impaired waters,²⁵ as well as implement and maintain any control measures or conditions to meet applicable water quality standards.²⁶ Additionally, as part of preparing the NOI, the covered Facility must make certain verifications such as verifying that no harm is done to a species in violation of the Endangered Species Act.²⁷ Hampton River Marina has failed to prepare and file an NOI meeting all applicable requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

3) Hampton River Marina Must Take Control Measures and Meet Water-Quality Effluent Limitations.

To be eligible to discharge under the MSGP, Hampton River Marina must select, design, install, and implement control measures (including best management practices) to prevent polluted stormwater discharges from reaching nearby waterbodies. Hampton River Marina must address the selection and design considerations in the permit, meet the non-numeric effluent limitations in the permit, and meet limits contained in applicable permit effluent limitations guidelines.²⁸ These control practices must be in accordance with good engineering practices and manufacturer’s specifications.²⁹ If the control measures are not achieving their intended effect of minimizing pollutant discharges, the permittee must modify these control measures as expeditiously as practicable.³⁰ Hampton River Marina has failed to cover the materials and operations that may result in polluted stormwater runoff. Hampton River Marina has not implemented the required control measures in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

4) Hampton River Marina Must Conduct Routine Facility Inspections.

²² See MSGP part 2.2.2.

²³ See *supra* p. 2.

²⁴ See MSGP, Appendix A: Definitions, Abbreviations, and Acronyms, at A-4 (defining the term “new discharger” as “a facility from which there is a discharge, that did not commence the discharge at a particular site prior to August 13, 1979, which is not a new source, and which has never received a finally effective NPDES permit for discharges at that site”); see also 40 C.F.R. § 122.2.

²⁵ See MSGP part 1.1.4.7.

²⁶ See MSGP part 2.2.2.3.

²⁷ See MSGP part 1.1.4.5 and 2.3.

²⁸ See MSGP part 2.1.

²⁹ *Id.*

³⁰ *Id.*

To be eligible to discharge under the MSGP, Hampton River Marina must conduct routine inspections of all areas of the Facility where industrial materials or activities are exposed to precipitation, and must ensure that all stormwater control measures comply with the effluent limits contained in the MSGP.³¹ Routine inspections must be conducted at least quarterly but in many instances monthly inspections are most appropriate.³² These inspections must occur when the Facility is in operation.³³ The schedule of these inspections must be included in the Facility's SWPPP and be performed by qualified personnel.³⁴ Hampton River Marina has failed to conduct the required routine inspections in accordance with the MSGP requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

5) Hampton River Marina Must Comply with the Required Monitoring and Sampling Procedures.

To be eligible to discharge under the MSGP, Hampton River Marina must collect and analyze stormwater samples and document monitoring activities consistent with the procedures in the MSGP.³⁵ The MSGP requires five types of analytical monitoring (one or more of which may apply) including quarterly benchmark monitoring, annual effluent limitations guidelines monitoring, State or Tribal-specific monitoring, impaired waters monitoring, and other monitoring as required by the EPA.³⁶ An operator must monitor each outfall identified in the SWPPP covered by a numeric effluent limit.³⁷ Required monitoring must be performed after stormwater events that result in an actual discharge on a required schedule.³⁸ All monitoring data collected under the Permit must be reported to EPA. Furthermore, because Hampton Harbor is an "impaired water" under 33 U.S.C. § 1313(d), Hampton River Marina must monitor for all pollutants for which Hampton Harbor is impaired.³⁹ Hampton River Marina has failed to conduct the required monitoring under the MSGP and has failed to submit the required monitoring reports to EPA in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

6) Hampton River Marina Must Carry out the Required Reporting and Recordkeeping.

³¹ See MSGP part 4.1.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ See MSGP part 6.

³⁶ See MSGP part 6.2.

³⁷ See MSGP part 6.1.1.

³⁸ See MSGP part 6.1.3.

³⁹ See MSGP part 6.2.4

Hampton River Marina must maintain and submit any and all required monitoring data.⁴⁰ Such monitoring data includes the following: an annual report to EPA which includes the Facility's findings from the annual comprehensive site inspection and any documentation of correction actions;⁴¹ an Exceedance Report to the EPA if any of the follow-up monitoring shows any exceedances of a numeric effluent limit;⁴² and any other required reports under the MSGP.⁴³ Hampton River Marina has failed to maintain the required records and failed to submit all required monitoring data under the MSGP in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

7) Hampton River Marina Must Comply with the Requirements of MSGP Subparts Q and R.

Hampton River Marina must also comply with the sector-specific requirements contained in Subparts Q and R of the MSGP.⁴⁴ Subparts Q and R require water transportation and boat and ship building and repair facilities to implement additional technology-based effluent limits,⁴⁵ meet additional SWPPP and inspection requirements,⁴⁶ and monitor stormwater discharges for compliance with the benchmark limitations applicable specifically to water transportation facilities.⁴⁷ Hampton River Marina has failed to comply with the additional requirements of Subparts Q and R of the MSGP in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

d. Hampton River Marina is violating the Clean Water Act by failing to obtain coverage and failing to comply with the requirements of an Individual NPDES Permit.

Hampton River Marina is violating 33 U.S.C. §§ 1311 by failing to apply for, obtain coverage, and comply with the requirements of an individual NPDES for its process water discharges. Hampton River Marina's failure to obtain coverage and comply with the permit conditions of an

⁴⁰ See MSGP part 7.1

⁴¹ See MSGP part 7.2.

⁴² See MSGP part 7.3.

⁴³ See MSGP part 7.4.

⁴⁴ See MSGP, Appendix D, Table D-1, Sectors Q and R.

⁴⁵ See MSGP parts 8.Q.3; 8.R.3.

⁴⁶ See MSGP parts 8.Q.4 and 8.Q.5; 8.R.4 and 8.R.5.

⁴⁷ See MSGP 8.Q.6.

individual NPDES permit, or prevent process water discharges, is a continuing violation of the Clean Water Act.⁴⁸

DATES OF VIOLATION

Each day on which Hampton River Marina operates its Facility without general permit coverage or discharges stormwater from the Facility without a permit is a separate and distinct violation of Section 301(a) and 402(p)(2)(B) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

Each day on which Hampton River Marina operates its Facility without individual permit coverage or discharges process water from the Facility without a permit is a separate and distinct violation of Section 301(a) of the CWA, 33 U.S.C. §§ 1311(a).

Hampton River Marina has discharged stormwater without a permit in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), on every day, since at least 2007, on which there has been a measurable precipitation event.

Every day, since at least 2007, on which Hampton River Marina has failed and continues to fail to apply for, obtain coverage, and comply with the requirements of the MSGP is a violation of Section 402(p)(3)(A) and (p)(4)(A) of the CWA, 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A).

Hampton River Marina has discharged process water without a permit in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), on every day since at least 2007 on which boat washing, hull cleaning, or pressure washing activities have been conducted at the Facility.

Every day, since at least 2007, on which Hampton River Marina has failed and continues to fail to apply for, obtain coverage, and comply with the requirements of an individual NPDES permit is a violation of Section 301(a) of the CWA, 33 U.S.C. §§ 1311(a).

These violations are ongoing and continuous, and barring a change in the stormwater management controls and process water controls at the Facility and full compliance with the permitting requirements of the Clean Water Act, these violations will continue indefinitely.

RELIEF REQUESTED

Hampton River Marina is liable for the above-described violations occurring prior to the date of this letter, and for every day that these violations continue. Pursuant to Section 309(d) of the Act,

⁴⁸ A thorough search of EPA's Enforcement & Compliance History Online (ECHO) database reveals that Hampton River Marina has not obtained an individual NPDES for the Facility. EPA's Enforcement & Compliance History Online (ECHO), <http://echo.epa.gov/> (last visited September 22, 2014).

33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the Act subjects Hampton River Marina to a penalty up to \$32,500 per day for each violation which occurred between March 15, 2004 and January 12, 2009, and up to \$37,500 per day for each violation that occurred after January 12, 2009.⁴⁹ CLF will seek the full penalties allowed by law.

In addition to civil penalties, CLF will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), and such other relief as permitted by law. CLF will seek an order from the Court requiring Hampton River Marina to correct all identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Lastly, pursuant to Section 505(d) of the Act, 33 U.S.C. § 1365(d), CLF will seek recovery of costs and fees associated with matter.

CONCLUSION

During the 60-day notice period, CLF is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of further litigation. If you wish to pursue such discussions, please have your attorney contact Zachary Griefen within the next 20 days so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing at the conclusion of the 60 days.

Sincerely,



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⁴⁹ 40 C.F.R. § 19.2



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